

DOCUMENT RESUME

03330 - [A2413554]

[Acceptance of Nonconforming Material]. B-188516; E-188517; B-188656. August 25, 1977. 5 pp. + enclosure (1 pp.).

Decision re: Domar Industries; by Milton Socolar (for Elmer B. Staats, Comptroller General).

Issue Area: Federal Procurement of Goods and Services (19C0).

Contact: Office of the General Counsel: Procurement Law I.

Budget Function: National Defense: Department of Defense - Procurement & Contracts (058).

Organization Concerned: Aurora Cord & Cable Co.; Department of the Army: Materiel Development and Readiness Command.

Authority: 55 Comp. Gen. 231. 55 Comp. Gen. 237. 54 Comp. Gen. 237. B-185664 (1976). B-181447 (1974). 4 C.F.R. 20.

The protester challenged any award to the low bidder on the grounds that the low bidder intended to use material not conforming to the fabrication specifications. The Government's minimum needs were overstated, and the proper method to determine savings would be resolicitation of the two preaward procurements to reflect the needs of the Government. Concerning the protests with regard to two awarded contracts, if any favorable action is contemplated on current or future requests for waivers, termination with a view toward resolicitation should be considered. (Author/SC)

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**DECISION**



**L. Koslakowski**  
**Proc. I**  
**THE COMPTROLLER GENERAL**  
**OF THE UNITED STATES**  
**WASHINGTON, D.C. 20548**

**FILE: B-188516, B-188517, B-188656 DATE: August 26, 1977**

**MATTER OF: Domar Industries**

**DIGEST:**

1. Where Government has unknowingly accepted nonconforming item, concedes acceptability of item by granting waivers accompanied by price decreases under existing contracts and has amended current solicitations and presumably will amend future solicitations, to permit delivery of item, minimum needs are overstated. Although record demonstrates uncertainty as to impact on bidding, proper method to determine savings is resolicitation of two preaward procurements reflecting needs of Government. Concerning two awarded contracts, if any favorable action is contemplated on current or future requests for waivers, termination with view toward resolicitation should be considered.
2. Post-award protests against waiver of specification requirement after award by contract modification will be considered where request for waiver has not been acted on by agency under one contract and no request for waiver has been made under another contract although presumably such request is foreseeable.

This decision involves the following four solicitations issued by the Department of the Army, United States Army Materiel Development and Readiness Command:

<u>Reference No.</u>	<u>Solicitation</u>	<u>Issued</u>	<u>Contract</u>
B-188516	DAAEO7-77-B-3240	February 2, 1977	(Before award)
B-188517	DAAEO7-77-B-3238	February 4, 1977	(Before award)
B-188656	DAAEO7-77-B-3246	January 20, 1977	DAAEO7-77-C-3502
	DAAEO7-77-R-3178	November 29, 1976	DAAEO7-77-C-3350

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Aurora Cord & Cable Company (Aurora) was the lowest bidder/offeror on each of the above solicitations. Domar Industries (Domar) has challenged any award to Aurora on the grounds that Aurora intends to use material not conforming to the specification in the fabrication of Military Part Number (MPN) 8724316, "Body Assembly, Trailer Plug" (Plug) and specifically the shell thereof. The plug is common to all of the end items (Cable Assemblies) being procured under the above solicitations. The record indicates that end items containing non-conforming plugs have been unknowingly accepted by the Government for a number of years. This did not surface until after the Army investigated the grounds for Domar's protests filed in this Office.

The plug consists of several metal parts, one of which is the "Shell" (MPN 8701279). The drawings require the shell to be made from material in accordance with specification QQ-S-631, or QQ-S-634, or QQ-S-637, which is steel bar stock. Aurora, in response to Domar's protest, admitted use of seamless steel tubing for several years. Additionally, Aurora contends that it is merely supplying the same material for the shell as numerous other contractors have done since 1958. There is no question but that compliance with the specification is possible. The acceptance of nonconforming material is directly attributable to the Army's admitted failure to closely scrutinize the alleged certificates of conformance of Aurora's plug subcontractors. The Army has reported that improved inspection and acceptance procedures to avoid recurrences have been implemented.

A waiver under a contract not involved in the protests (DAAE07-76-C-1505) was requested by Aurora on March 4, 1977, after the Government declined to accept additional nonconforming plugs. The Government allowed the waiver after Aurora had shipped almost the entire contract quantity of nonconforming items, on the oral advice of the Defense Contract Administration Services Management Area, Chicago (DCASMA), that the cost of the plug would be about equal when made from either material.

Following its original waiver request under contract DAAE07-76-C-1505, Aurora requested similar waivers on four additional contracts and one purchase order, as follows:

Contract/Purchase Order No.

Award Date

DAAE07-76-C-1505  
DAAE07-76-C-2876  
DAAE07-76-C-4310  
DAAE07-76-C-4204  
DAAE07-76-M-5097  
DAAE07-77-C-3350 (B-188656)

November 14, 1975  
March 26, 1976  
August 19, 1976  
July 28, 1976  
January 20, 1977  
January 28, 1977

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Contract modifications have been issued with a negotiated decrease in unit prices for all of the above except the contract under protest for which a waiver was requested.

The DCA/MA Price/Cost Analysis Report upon the waiver requests differs from the earlier oral advice that the cost of the plugs using bar stock or tubing was indicated to be approximately equal due to offsetting cost differences. Bar stock was supposedly lower in material cost but higher in machining cost than tubing. The report indicates lower costs in both material and machining in the use of tubing. An amount for the plug using the specified bar stock could not be calculated based on actual experience, since no companies had previously used that material. The report found that Aurora had never purchased bar stock in the past or had a current supply. Aurora had purchased and used steel tubing since the inception of the contracts for which waivers were requested. The report recommended a price reduction of \$0.29 per unit whereas Aurora had proposed price increases.

The Army and Aurora have raised the question of the timeliness of Domar's protests under B-188656. The closing date for receipt of proposals under request for proposals (RFP) DAAE07-77-R-3178 was December 27, 1976. Aurora was awarded contract No. DAAE07-77-C-3350 on January 28, 1977, and on the same day written notice of award was mailed to the protester. Domar did not file a protest with this Office until March 23, 1977.

Under invitation for bids (IFB) DAAE07-77-B-3246, bids were opened on February 15, 1977. Award was made to Aurora on February 23, 1977. Notice of award was mailed to Domar on the same day. Domar filed its protest with this Office on March 23, 1977. Both the Army and Aurora argue that, since Domar was aware prior to award that Aurora previously used nonconforming material in the plug, the protest to be timely should have been filed within 10 working days after Domar received notice of award. 4 C.F.R. part 20 (1977).

The bases for Domar's protests are that (1) Aurora, because of its past practice of supplying nonconforming items, should be determined nonresponsive and (2) waiver of the requirements by the Government immediately after award would be prejudicial to other bidders. The first basis of protest is clearly untimely since Domar received notice of award within a few days of mailing and protested here well over 10 days thereafter. However, the Government has withheld action on the waiver

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request under contract DAAEO7-77-C-3350 and has stated that further waivers will be considered individually upon request from Aurora, presumably referring to contract DAAEO7-77-C-3502 and contracts for which Aurora is in line for award. It would be incongruous to dismiss Domar's protest as untimely and then await expected future waivers based on past Army action after issuance of our decision so that Domar could then timely protest the waivers.

Accordingly, we will consider Domar's protests on these two contracts on the merits as well as the protests before award which are also timely filed.

The Army states that the nonconforming plug has not been reported as a cause of failure on 20 end items which included the plug. Further, in the agency report, the Army admits that "an amount for the 'Plug' using the specified bar stock could not be calculated based on actual experience since no companies had previously used that material." Also, there is an indication from Aurora that to the best of its knowledge conforming material has not been used since 1958.

It is clear that the Government has overstated its minimum or actual needs in requiring the shell to be made from bar stock. Beside accepting the nonconforming items in the past, originally unknowingly, and presently by the formal granting of waiver requests, the Army has amended outstanding and, we presume, will amend future solicitations, to reflect an Engineering Evaluation Report (EER) which will permit the use of steel tubing as additional optional material with which to perform contracts.

As for the two protests filed before award, we did state in Edward B. Friel, Inc., 55 Comp. Gen. 231, 237 (1975), 75-2 CPD 164, that "The fact that the terms of an IFB are deficient in some way does not necessarily justify cancellation after bids have been opened and bidders' prices exposed." See Joy Manufacturing Company, 54 Comp. Gen. 237 (1974), 74-2 CPD 183. However, in determining if such a cogent and compelling reason exists to justify cancellation two factors must be examined: (1) whether the best interest of the Government would be served by making an award under the subject solicitation, and (2) whether bidders would be treated in an unfair and unequal manner if such an award were made.

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The question of whether bidders would be competitively prejudiced if such an award were made cannot be answered with certainty from the record. Domar contends the reduction in material and machining costs to make plugs from tubing is \$0.81 to \$0.84 per unit not including profit and general and administrative (G&A) expenses. The DCASMA report estimates only a \$0.29 difference per unit or less because of possible scrap savings by Aurora in using bar stock. To further emphasize the uncertainty, the DCASMA report was admittedly based on certain judgmental areas including agency estimates rather than contractor-provided G&A rates. Also, Aurora and the Army negotiated actual contract decreases per unit of \$0.16. The record also shows that Aurora is at least \$1.00 per unit below Domar on all of the protested solicitations. Under the circumstances, we feel the proper method to determine the possible cost savings to the Government and impact resulting from this apparent inequality of competition is resolicitation accurately reflecting the needs of the Government after the cancellation of DAAE07-77-B-3240 and DAAE07-77-B-3238. Cummins Mid-America, Inc., B-185664, May 26, 1976, 76-1 CPD 343, and cases cited in text; see Terra Corporation, B-181447, December 26, 1974, 74-2 CPD 383.

With regard to the two contracts awarded, similar to our holding above, we believe that since the Army overstated its minimum needs in competing the contracts, the Army should consider the feasibility of terminating those contracts with Aurora for the convenience of the Government with a view toward resolicitation if any favorable action on current or future requests for waivers is contemplated.

Accordingly, the protest of Domar is sustained.

*for* *Sheldon J. Aorstan*  
Comptroller General  
of the United States



COMPTROLLER GENERAL OF THE UNITED STATES  
WASHINGTON, D.C. 20548

L. Kozlakowski  
Proc. I

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August 26, 1977

The Honorable  
The Secretary of the Army

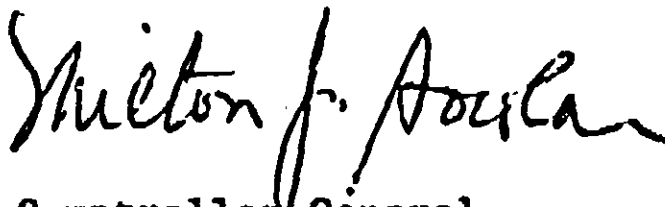
Dear Mr. Secretary:

Enclosed is a copy of our decision of today sustaining the protests of Domar Industries, under solicitation Nos. DAAEO7-77-B-3240; -3238; -3246; and R-3178, issued by the United States Army Materiel Development and Readiness Command.

Your attention is directed to that portion of our decision which recommends cancellation of solicitation Nos. -3240 and -3238 and resolicitation of the requirements thereunder, and the possible consideration of the feasibility of terminating contract Nos. DAAEO7-77-C-3502 and -3350 (solicitation Nos. -3246 and -3178, respectively) with Aurora Cord and Cable Company.

Please advise our Office of any action taken with regard to the recommendation.

Sincerely yours,

*for*   
Comptroller General  
of the United States

Enclosure